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Supreme Court, U.S.
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No. 10-1043

IN THE

Supreme Court of the United States

ALEJANDRO HERNANDEZ,

Petitioner,

v.

JESUS TERRONES, GUILLERMO MARTINEZ, ARTURO RUIZ, JR., ANTONIO TABULLO, JOE ZIMMERLY, AND PEDRO OCEGUEDA,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

Respondents never dispute that a mature split of authority exists regarding the appropriate standard for establishing a pretrial due process claim. Instead, they contend that this Court need not resolve the issue here because Petitioner supposedly lacks the ability to prove that Respondents manufactured evidence, or did so willfully, as required to establish such a claim. Respondents' attempt to muddy the waters, however, is belied by the record. Alternatively, Respondents argue that this Court should decline to recognize a pretrial due process claim because to do so would expand the scope of substantive due process. Respondents are free to press this argument on the merits, but it is no reason to deny review here. Mr. Hernandez's petition should be granted.

I. Respondents Have Not Challenged the Existence of a Circuit Split.

Noticeably absent from Respondents' submission is any opposition to Petitioner's showing of a Circuit split regarding the appropriate standard for pretrial due process claims. Nor do Respondents contest the importance of the pretrial due process right.

In *Baker* v. *McCollan*, 443 U.S. 137, 144 (1979), the Court held that a criminal suspect "could not be detained indefinitely in the face of repeated protests of innocence even though the warrant under which he was arrested and detained met the standards for the Fourth Amendment." To the contrary, "mere detention pursuant to a valid warrant but in the face of repeated protests of innocence will, after the lapse of a certain amount of time, deprive the accused of 'liberty . . . without due process of law.'" Id. at 145.

As Mr. Hernandez set forth in detail in his petition for certiorari, the Circuits are divided on when the rule in *Baker* is triggered and liability can be imposed for illegal detention following an arrest.[1]

The Fifth and Fourth Circuits require the police to investigate information tending to suggest a suspect's innocence only when that information eliminates any and all threads of evidence tying plaintiff to the crime. See *Sanders* v. *English*, 950 F.2d 1152, 1164 (5th Cir. 1992); *Gay* v. *Wall*, 761 F.2d 175, 178-79 (4th Cir. 1985). In contrast, the First, Third and Eleventh Circuits have ruled that an officer has a duty to act – and thereby, liability can be imposed for an officer's failure to do so – when he or she learns of exculpatory evidence that undermines probable cause. *See Brady* v. *Dill*, 187 F.3d 104, 123 (1st Cir. 1999) (Pollak, J. concurring); *Thompson* v. *Olson*, 798 F.2d 552, 556 (1st Cir. 1986); *Wilson* v. *Russo*, 212 F.3d 781, 792 (3d Cir. 2000); *Cannon* v. *Macon County*, 1 F.3d 1558, 1563 (11th Cir. 1993). This more relaxed standard allows a plaintiff to prevail without showing the complete absence of evidence linking him to the crime; instead, a plaintiff must demonstrate that, at some point prior to trial, the available evidence diminished to a point where it became insufficient to support a reasonable belief that he was guilty. *Id.* Finally, the Second and Eighth Circuits place dispositive weight on the officers' misconduct and examine the materiality of the evidence ignored or withheld as a secondary condition. See *Russo* v. *City of Bridgeport*,

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[1] Respondents' contention that, if a pretrial due process right even exists, it arises under the Fourth Amendment, only serves to further highlight the need for this Court's guidance on this critical issue.

479 F.3d 196, 211-12 (2d Cir. 2007); *Amrine* v. *Brooks*, 522 F.3d 823, 833-35 (8th Cir. 2008); *Wilson* v. *Lawrence County*, 206 F.3d 946, 955-57 (8th Cir. 2001).

Just as Respondents fail to address in any meaningful way the legal issue presented for certiorari, they also never contest the importance of the pretrial due process right at issue. That concession is unsurprising. The pretrial due process right is the only remedy for detentions that are wrongfully prolonged (even though lawfully initiated) where the aggrieved person was either never brought to trial, or was tried and acquitted. In every such case, the existence of probable cause for the arrest bars a civil cause of action under the Fourth Amendment. And the lack of a trial, or the person's vindication at trial, precludes a due process claim for violation of his "trial rights," such as those under *Brady*. As a result, liability for a pretrial due process violation is the only way to remedy wrongful (and often lengthy) pretrial detentions. It is also the only way to incentivize police officers to release a detained person when no reasonable officer could believe that the available evidence provides sufficient cause to believe that person is guilty.

II. The Issue In The Petition Is Squarely Presented, Notwithstanding Respondents' Attempts To Mischaracterize The Factual Record.

Respondents suggest that regardless of the standard for a pretrial due process violation, Mr. Hernandez's petition should be denied because the police officers here neither manufactured evidence

nor committed any willful misconduct.[2] But Respondents cannot avoid this Court's review by muddying the waters in this fashion. As set forth in Mr. Hernandez's petition for certiorari, there is compelling evidence that Respondents not only fabricated a witness's identification of Mr. Hernandez, but also withheld from the prosecutor and Petitioner the lengths they had gone to in coercing the witness' identification. App. 77a-78a, 82a, 85a. Additionally, the record demonstrates that Respondents withheld that a second witness had given them information eviscerating the purported link between Petitioner and his co-defendant, App. 91a-92a, and that Respondents ignored leads pointing to the true perpetrator, Brandon Hamilton, who confessed to the murder and whose fingerprints were found at the scene. Id.[3]

As the district court found based on its review of the entire record, evidence suggests the whole investigation into the murder for which Mr. Hernandez was wrongfully convicted was a complete

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[2] Respondents spend a large portion of their brief addressing Mr. Hernandez's claims under *Brady* v. *Maryland*, 373 U.S. 83 (1963) and for an unduly suggestive identification. This lengthy detour is peculiar and irrelevant, as Mr. Hernandez's petition for certiorari does not challenge the Fifth Circuit's conclusions as to either of these claims. To the contrary, Mr. Hernandez' petition raises issues concerning the Fifth Circuit's standard for a reckless investigation claim and stresses that such a claim is a necessary recourse for those litigants for whom a *Brady* claim or other trial-based claim is foreclosed.

[3] It was only after a request by the state prosecutor that the police took Hamilton's statement at all. App. 57a n.10.

farce.[4] These facts are sufficient to show a violation of Mr. Hernandez's pretrial due process rights.

Respondents' alternative assertion – that recognizing a claim for the pretrial deprivation of due process would improperly expand substantive due process – is at best an argument for the merits, and not a reason to deny certiorari. Furthermore, this Court already has already recognized such a claim in *Baker* 443 U.S. at 144-45; see also *id.* at 148 (Blackmun, J., concurring). Granting this petition to clarify the standard for triggering the recognized duty to investigate in no way entails expanding the scope of substantive due process.

III. This Case Presents An Ideal Opportunity to Resolve the Circuit Split.

In contrast to Respondents' assertion to the contrary, Mr. Hernandez's case present an ideal opportunity to resolve the Circuit split regarding how to analyze a pretrial due process claim. Mr. Hernandez's case presents the very issue implicated by the split of authority: what standard the courts should use to analyze a pretrial due process claim. On the identical facts, Mr. Hernandez's claim would undoubtedly have survived summary judgment

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[4] With no leads, Respondents "on a hunch" extrapolated a name from a graffiti tag on the back of a strip mall, made a "recondite" (to borrow the district court's word) link from that tag to Mr. Hernandez because Mr. Hernandez allegedly once tried to shoplift a pair of jeans with a man whose nickname was close to but not the same as – the graffiti tag, and then improperly honed in on Mr. Hernandez as the purported perpetrator to the exclusion of all other suspects, including one who confessed to the crime and whose fingerprints were found at the crime scene. The whole "investigation" was truly that absurd.

under the standard followed by the First, Third and Eleventh Circuits' (requiring "probable cause to continue to detain") or the standard followed by the Second and Eighth Circuits' (focusing on the officers' misconduct).

CONCLUSION

Because of the significant confusion surrounding a pretrial due process claim and the attendant standard for that claim, as well as the importance of the Constitutional right at stake, this Court should grant Mr. Hernandez's petition for certiorari.

Respectfully submitted,

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